Supreme Court, U.S.
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No. 04-683

In The

Supreme Court of the United States

BILL H. BARBEE, ET AL.,

Petitioners,

v.

COLONIAL HEALTHCARE CENTER, INC. AND MORRIS ESFORMES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a Bankruptcy Court have discretion to abstain from the exercise of exclusive §1334(e) bankruptcy jurisdiction under 28 U.S.C. §1334(c)(1)?

Does a Bankruptcy Court have discretion under 28 U.S.C. §1334(c)(1) to abstain from the exercise of diversity jurisdiction under 28 U.S.C. §1332?

Did Congress intend to codify this Court's judicial doctrine of abstention when it enacted 28 U.S.C. §1334(c)(1)?

The Second Circuit and the Fifth Circuit conflict in the test applied to permissive abstention under 28 U.S.C. §1334(c)(1). Which test is correct?

PARTIES TO THE PROCEEDINGS

Petitioners state that the following parties appeared in the U.S. Court of Appeals for the Fifth Circuit:

Plaintiffs:

1. Bill H. Barbee
2. Helen C. Barbee
3. B. Hull Barbee
4. F.E. Brown
5. Clark Collier Orren 1993 Trust
6. Clark Collier Orren GP Trust
7. Bobby F. Collier
8. Curtis Collier
9. Michael J. Collier
10. Michael J. Collier, Jr.
11. Pat Collier
12. Joyce Davenport
13. Tyrone Davenport
14. Davenport Enterprises, Inc.
15. Jay T. Gordon
16. Joost Gosschalk
17. Lottie Guttry
18. William H. Hudspeth
19. Joel Patrick Collier, Jr. 1993 Trust
20. Joel Patrick Collier GP Trust
21. Marjorie Kimbrough, Executrix for the Estate of O. L. Kimbrough
22. Ester Knox
23. Tom Landers
24. Earle E. Little
25. Edward Mack
26. H.A. Orgain
27. Heather Webber f/k/a Heather Ruffin
28. Vicki M. Thomas

Defendants:

1. Colonial Healthcare Center, Inc.
2. Morris Esformes

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PETITION FOR A WRIT OF MANDAMUS AND/OR CERTIORARI

Petitioners, the 28 individuals listed above, respectfully pray that a writ of mandamus, or in the alternative, a writ of certiorari, issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 3, 2004, dismissing Petitioners' appeal and denying their application for writ of mandamus to the United States District Court for the Northern District of Texas, Dallas Division, to compel it to exercise its jurisdiction to determine the validity and extent of liens on the Debtor's property, and its obligation to hear disputes involving citizens of different states.

OPINIONS BELOW

The opinion and order of the United States Bankruptcy Court for the Northern District of Texas (unreported), dated March 10, 2003, which abstained from the exercise of federal jurisdiction over Plaintiff's claims is reproduced in Appendix C. The unreported opinion and order of the United States Bankruptcy Court denying Plaintiff's Motion for Reconsideration is reproduced in Appendix D. The unreported opinion of the United States District Court for the Northern District of Texas affirming the Bankruptcy Court's abstention order is reproduced in Appendix B. The per curiam order of the United States Court of Appeals for the Fifth Circuit, dismissing Plaintiffs' appeal under 28 U.S.C. §1334(d), is reproduced in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 2004. This petition is filed within ninety days of entry of that order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1651 and §1254(1). Plaintiffs disagree with the Fifth Circuit's view concerning the applicability of 28 U.S.C. §1334(d). That argument is presented at pages 9-11 below.

STATUTES INVOLVED

1. 28 U.S.C. §1334(c)(1):

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for state law from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

2. 28 U.S.C. §1334(d):

> Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

3. 28 U.S.C. §1334(e):

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 28 U.S.C. §157(b)(2)(K):

> Core proceedings include, but are not limited to. . . .
>
> (K) determinations of the validity, extent, or priority of liens;

PERSONS FROM WHOM RELIEF IS SOUGHT AND REASONS WHY RELIEF IS NOT AVAILABLE FROM ANY OTHER COURT.

Petitioners seek this Court's mandate directing the United States District Court for the Northern District of Texas to exercise its original jurisdiction over Petitioners' claims for enforcement of their liens and turn over of the Debtor's property. The District Court refused to exercise original jurisdiction when Petitioners filed an original proceeding to withdraw reference from the Bankruptcy Court, relying upon and affirming the Bankruptcy Court's abstention order. Subsequently, while this appeal was pending, the Missouri state court terminated the state court receivership proceedings, and refused to allow Petitioners to participate in the proceedings. Unless this Court issues its mandate to require the District Court to exercise jurisdiction in this case, the effect will be that the Missouri state court's ruling will constitute a binding *res judicata* judgment on the Debtor's interests in property –

an issue Congress deemed to be within the exclusive jurisdiction of the federal district courts. It will also deprive Petitioners of their interests in property without a hearing.

STATEMENT OF THE CASE

The Petitioners are part of a larger group of approximately 140 individuals who funded $14 million over a five year period of time to a nursing home company, Chartwell Healthcare, Inc., operating nursing homes in Florida, Missouri, and Texas. The company issued promissory notes payable monthly over a ten-year term in return for the funds. The notes were secured by the accounts receivable of the nursing homes.

Because of the high number of individuals who purchased the notes, each security interest conveyed was a very small amount of the total receivables and therefore qualified as an automatically-perfected security interest under the filing exemption set forth in UCC article 9.302(a)(5), 4 Tex. Bus. & Com. Code §9.302(a)(5) (repealed, now Revised UCC, art. 9.309(2)). When proceedings in bankruptcy were initiated against Chartwell Healthcare, Inc. and its subsidiaries in 1998, several disputes for priority were presented by competing secured creditors. These disputes were resolved largely through stipulated orders entered in the bankruptcy proceedings.

The Respondents in this case acquired custody of the Medicare and Medicaid proceeds of the healthcare receivables of one of the Chartwell nursing homes, Colonial Nursing Center, Inc., based on their status as the original lessors of the nursing home operations and their subsequent pre-petition application to a circuit

court in Jefferson City, Missouri, for their appointment as receiver for the Colonial nursing home. When Colonial Nursing Center, Inc. filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Texas, the state court stayed all proceedings in the state court receivership case pending the administration of the estate by the bankruptcy court.

In this case, which was commenced originally as an interpleader action by the Chartwell Chapter 7 Trustee, the Bankruptcy Court entered an Agreed Judgment under which the Petitioners were declared to have first priority secured status on the proceeds of the receivables of Colonial Nursing Center, Inc. which were still in the custody of the Respondents. The Respondents had notice of the motion for entry of the judgment and did not contest it.

Although the Bankruptcy Court acknowledged that it had exclusive jurisdiction under 28 U.S.C. §1334(e) to consider Petitioners' claims to enforce liens against property of the Debtor's estate (App. C-3 and C-4) and core jurisdiction to finally dispose of those claims under 28 U.S.C. §157(b)(2)(B), (E), and (K) (App. C-3), it abstained from the exercise of jurisdiction over the Plaintiffs' third party claims for declaratory relief and turn over of the funds held by the Respondents. The Bankruptcy Court identified no interests of comity that would justify abstaining to a proceeding which itself was stayed under 11 U.S.C. §362 since 1999, saying only that the jurisdiction conferred on the Bankruptcy Court was not intended to benefit secured creditors seeking recovery on their liens.

After receipt of the Order, Petitioners moved for reconsideration and, at the same time, moved to amend

their cross-claims to assert diversity jurisdiction.[1] The bankruptcy court denied both motions by opinion and order dated May 6, 2003. (App. D). Significantly, this Order clarified the earlier Order by stating that Petitioners' claims had not been dismissed; the adversary proceeding would be "administratively closed" pending Petitioners' efforts to collect the proceeds in Missouri. (App. D-2). Based upon this ruling, Petitioners not only appealed the abstention order to the District Court, but also filed a motion to withdraw reference requesting that the District Court exercise original jurisdiction in diversity.

The District Court affirmed the abstention order and wholly disregarded the motion to withdraw reference in its unreported opinion and order dated March 22, 2004. (App. B).

Petitioners filed a notice of appeal, or in the alternative, petition for writ of mandamus to the United States Court of Appeals for the Fifth Circuit on April 15, 2004. Defendants moved to dismiss that appeal based on 28 U.S.C. §1334(d). The appeal was dismissed and the application for writ of mandamus was denied by the Court of Appeals by per curiam order dated August 3, 2004. (App. A).

Petitioners alleged complete diversity under 28 U.S.C. §1332 and pre-emptive and exclusive jurisdiction under 28 U.S.C. §1334(e). Abstention decisions in cases of this type are properly reviewed by the Court of Appeals as a "final

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[1] Pursuant to 28 U.S.C. §1653 and *Whitmire v. Victus Ltd.*, 212 F.3d 885, 887-88 (5th Cir. 2000), Petitioners were entitled to amend defective allegations of jurisdiction at any time, either in the trial court or on appeal.

decision" that "effectively put the litigants out of court" under 28 U.S.C. §1291, and as a collateral order separate from the merits but requiring an immediate appeal. *Quackenbush v. Allstate Insurance Co.,* 517 U.S. 706 (1996); *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 345-50 (1976)[2]; *Webb v. B.C. Rogers Poultry, Inc.,* 174 F.3d 697, 699 (5th Cir. 1999), *cert. denied,* 528 U.S. 964 (1999); *In re Rupp & Bowman Co.,* 109 F.3d 237, 240 (5th Cir. 1997).[3] Contrary to the view of the courts below, 28 U.S.C. §1334(d) does not restrict appellate jurisdiction over abstention decisions where federal court jurisdiction does not depend upon "related to" jurisdiction under 28 U.S.C. §1334(b).

In the alternative, appellate jurisdiction existed under the All Writs Act, 28 U.S.C. §1651(a) to compel a federal court to exercise exclusive and pre-emptive jurisdiction and "decide a pending case." *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. at 352-53; *In re Dow Corning Corp.,* 113 F.3d 565, 569 (6th Cir. 1997), *cert. denied,* 522 U.S. 977 (1997).

The state court continued to suspend all proceedings in the receivership case pending Plaintiffs' appeal of the abstention order to the District Court and to the United States Court of Appeals. Immediately prior to the filing of this petition, however, the state court terminated the receivership and discharged the Receiver from any claims

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[2] *Thermtron* was overruled by the *Quackenbush* decision only insofar as it held that remand orders were not a "final decision" appealable under 28 U.S.C. §1291.

[3] *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 12 (1983); *In re Hamilton,* 35 F.3d 567 (6th Cir. 1994).

for turn over of the accounts receivable proceeds. The effect of the abstention order, therefore, was to deprive Plaintiffs of their right to enforce the Bankruptcy Court's judgment for recovery of the secured property. The Bankruptcy Court's Order had the effect of delegating to a state court the core determination of the validity and priority of liens in a Debtor's property under 28 U.S.C. §157(b)(2)(K).

ARGUMENT

A. Congress Never Intended for 28 U.S.C. §1334(d) to Limit Review of Abstention Decisions in Cases Not Dependent on §1334(b) for Federal Jurisdiction

Section 1334(d) of Title 28, the full text of which is set forth above at page 2, is derived from a virtually identical provision previously included within 28 U.S.C. section 1334(c)(2) prior to the 1994 Bankruptcy Reform Act. Prior to 1994, the reference to "under this subsection" clearly referred to mandatory abstention under section 1334(c)(2), and not permissive abstention "in the interest of comity." The legislative history accompanying the 1994 amendments makes no reference to any intent to expand the limitation of appellate review to include abstention decisions beyond the mandatory abstention provision set forth in 1334(c)(2). H.R. Rep. No. 103-835, 103rd Cong., 2d Sess, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 3340; 140 Cong. Rec. H10,764. One authoritative commentator, 1 Collier's on Bankruptcy §3.05[1] (15th Ed.), states "the new configuration of the materials contained in subsection 1334(d) continues the rights to appeal that previously existed, but adds one new right. . . ." Prior to 1994, many courts held that appellate jurisdiction existed

to review permissive abstention orders under section 1334(c)(1), notwithstanding the limitation of appellate review where abstention was mandatory under section 1334(c)(2).

Petititioners contend that the Bankruptcy Court's abstention order is outside the scope of 28 U.S.C. §1334(c)(1), and therefore subject to review notwithstanding 28 U.S.C. §1334(d) because: (1) section 1334(e) preempts state court jurisdiction over the Plaintiffs' claims, and therefore, a bankruptcy court cannot abstain from a matter over which it exercises exclusive jurisdiction; and (2) section 1334(c)(1) cannot apply where an independent basis for jurisdiction under 28 U.S.C. section 1332 exists over the case.

In *Webb v. B.C. Rogers Poultry Inc.*, 174 F.3d 697, 699 (5th Cir. 1999), *cert. denied,* 528 U.S. 964 (1999), the Fifth Circuit applied a test similar to the test Petitioners now urge this Court to adopt. Where federal jurisdiction is premised on section 1334(b) (jurisdiction broadly conferred for cases "arising under" or "related to" a case under title 11), a district court's decision to abstain under section 1334(c) is not subject to review by the Court of Appeals. *Id.* at 699-700. Where, however, an independent basis of jurisdiction exists under 28 U.S.C. §1332 (diversity jurisdiction), the abstention order is a "final order" over which the Court of Appeals must exercise jurisdiction under 28 U.S.C. §1291. *Id.* at 699.

There is no discretion in such cases to abstain unless the narrow strictures of the doctrine set forth in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) apply, and "a court necessarily abuses its discretion when it abstains outside of the doctrine's strictures." *Id.* at 700.

B. There is a Split in the Circuits Concerning the Scope of Permissive Abstention Under 28 U.S.C. §1334(c). This Case Presents an Important and Recurring Question of Whether the Judicial Abstention Doctrine Applies to Courts Exercising Abstention Under 28 U.S.C. §1334(c)

By its own terms, 28 U.S.C. section 1334(c)(1) does not authorize abstention where a ground other than "related to" jurisdiction under 1334(b), such as diversity of citizenship under section 1332, would apply to support federal jurisdiction over the case or controversy.

The Second Circuit Court of Appeals analyzed the legislative history and interpretation of 28 U.S.C. §1334(c)(1) in considerable depth in *In re Pan American Corporation,* 950 F.2d 839, 845 (2d Cir. 1991). The Court of Appeals stated that the section is substantially the same as former section 1471(d) of Title 28, and that the legislative history of the former section remained an important reference in construing its successor. The House Report accompanying the 1978 legislation stated that:

> [I]n order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court.

Id. at 845-46, quoting, H.R. Rep. No. 595, 95th Cong., 1st Sess, 446 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6401. The House Report specifically adopted judicial standards applicable to the exercise of discretionary abstention as follows:

> The [discretionary abstention] subsection recognizes the exigencies that arise in such cases as *Thompson v. Magnolia Petroleum,* 309 U.S. 478 (1940), in which it is more appropriate to have a State court hear a particular matter of State law.

Id. at 846.

According to the Second Circuit:

> Congress thus intended that section 1334(c)(1) be informed by principles developed under the judicial abstention doctrines, and courts have usually looked to these well-developed notions of judicial abstention when applying section 1334(c)(1).

Id. at 846. Even the Fifth Circuit has sometimes applied this standard rather than the standard applied by the District Court in this case. *Compare Bank One, NA v. Boyd,* 288 F.3d 181, 184 (5th Cir. 2000) *and Webb v. B.C. Rogers Poultry Inc.,* 174 F.3d 697, 699 (5th Cir. 1999), *cert. denied,* 528 U.S. 964 (1999) *with In re Gober,* 100 F.3d 1195 (5th Cir. 1996) and *In re Republic Reader's Service, Inc.*, 81 B.R. 422, 428 (Bankr. S.D. Tex. 1987). *See also In re Hillsborough Holdings Corp.,* 123 B.R. 1004, 1013 (Bankr. M.D. Fla 1990), *aff'd,* 123 B.R. 1018 (M.D. Fla 1991) ("this abstention provision should only apply if the interests of the entities seeking abstention will be promoted by abstention and when they override the court's presumptive duty to hear and resolve matters which are properly before it"); *In re DeLorean Motor Co.,* 49 B.R. 900, 910 (Bankr. E.D. Mich. 1985) (abstention "has been viewed as an extraordinary and narrow exception to the duty of the federal courts to adjudicate controversies which are properly before it"); *In re All American of Ashburn, Inc.,* 49 B.R. 926 (Bankr. N.D. Ga. 1985) (discretionary abstention was not appropriate in adversary proceeding to collect accounts receivable).

Second, section 1334(c)(1) does not authorize bankruptcy courts to abstain from hearing cases within the District Court's diversity jurisdiction. It only authorizes a district court to make that determination. If the bankruptcy issues were considered insubstantial to the Bankruptcy Court, the proper remedy should have been to refer the matter to the District Court for determination under its diversity jurisdiction, rather than abstaining to a state court that had already expressly deferred these issues to the Bankruptcy Court.[4] Administration of a bankruptcy estate and the effect of a case on such administration is a basis for "related to" jurisdiction; but the absence of such an effect is not alone sufficient for abstention by a district court sitting in diversity.

The abstention doctrine is a very narrow, judge-made exception to the constitutional requirement that the federal courts must exercise the jurisdiction authorized by Congress. According to this Court:

> We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. Virginia, 6 Wheat (19 U.S.) 264 (1821), *quoted in New Orleans Public Services, Inc. v. City of New Orleans,* 491 U.S. 350, 358-59 (1989); *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976);

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[4] See Record at 1097 and 1149 ("The order and judgment specifically makes no determination as to the rights and priorities of any party or non-party with respect to the Pre-Receivership Receivables or the proceeds thereof, or any offsets asserted by James Lincoln, Jim Lincoln & Associates, Health Systems, Inc., or the Successor Operators, *deferring the same to the Bankruptcy Court.") (emphasis supplied).*

Growe v. Emison, 507 U.S. 25, 32 (1993) (abstention authorized in only two circumstances); *Sayers v. Forsyth Building Corp.,* 417 F.2d 65, 73-74 (5th Cir. 1969) (reversing abstention by the District Court; "absent the most compelling reason the plaintiffs have a right to have the case adjudicated in the federal system").

C. Mandamus Relief is Appropriate in this Case

The Courts of Appeal have applied inconsistent standards in reviewing the propriety of abstention under 28 U.S.C. §1334(c). *Compare In re Pan American Corporation,* 950 F.2d 839, 845 (2d Cir. 1991); *Webb v. B.C. Rogers Poultry Inc.,* 174 F.3d 697, 699 (5th Cir. 1999), *cert. denied,* 528 U.S. 964 (1999); *with In re Gober,* 100 F.3d 1195 (5th Cir. 1996), and the District Court opinion in this case. (App. B). There is no discretion in such cases to abstain unless the narrow strictures of the doctrine set forth in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) apply, and "a court necessarily abuses its discretion when it abstains outside of the doctrine's strictures." *Webb, 174 F.3d at 700.*

Section 1334(c)(1) was intended by Congress to apply only to those cases where the bankruptcy court's jurisdiction is peripheral to the underlying bankruptcy case, and covered by federal jurisdiction only because of the broad test for "related to" jurisdiction under §1334(b).[5] It was not

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[5] *In re Pan American World Airways, Inc.,* 950 F.2d 839, 845 (2d Cir. 1991), *quoting* H.R. Rep. No. 595, 95th Cong., 1st Sess. 446 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6401 ("The [discretionary abstention] subsection recognizes the exigencies that arise in such cases as *Thompson v. Magnolia Petroleum,* 309 U.S. 478 (1940) in which it is more appropriate to have a State court hear a particular matter of State law.").

intended to apply to claims which are pre-empted by federal bankruptcy law.[6]

Mandamus relief is appropriate here. This Court made clear in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 352-53 (1976)[7] that "[a] traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." "Repeated decisions of the [Supreme Court], have established the rule . . . that the writ will lie in a proper case to direct a subordinate Federal court to decide a ending cause." *Id.*

In *Thermtron,* this Court determined that 28 U.S.C. §1447(d), a statute similar to 28 U.S.C. §1334(d), did not create a bar from the exercise of jurisdiction in mandamus, where the District Court relied upon a ground not permitted under the statute for remand orders (overcrowding of the federal docket). Similarly, in this case, the Bankruptcy Court had no discretion to abstain in a case outside the scope of "related to" jurisdiction under 28 U.S.C. section 1334(b). Accordingly, as in *Thermtron,* there is no impediment to review the Bankruptcy Court's abstention order, and the

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[6] *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 815, n.21 (1976) ("the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention"); *Christ the King Regional High School v. Culvert,* 815 F.2d 219, 223, n. 4 (2d Cir. 1987), *cert. denied,* 484 U.S. 830 (1987) ("The underlying rationale for this doctrine is that it would be futile to abstain in deference to a state decisional body if it later should develop that it may not have jurisdiction over a dispute due to the preemptive jurisdiction of a federal body."); *Stone & Webster Eng Corp. v. Ilsley,* 690 F.2d 323, 326 n. 2 (2d Cir. 1982), *aff'd sub nom Arcudi v. Stone & Webster,* 463 U.S. 1220 (1983) ("Abstention . . . is not appropriately invoked in a preemption case.").

[7] *See* note 2, *supra.*

District Court's failure to exercise its own jurisdiction in diversity, because neither court had discretion to abstain under 28 U.S.C. §1334(c) in a case governed by section 1332 and 1334(e).

By requiring individual and elderly plaintiffs to prosecute their claims in a distant forum, the District Court has deprived the Plaintiffs of their right to choose a federal forum for their dispute and completely abdicated its constitutional duty to exercise the jurisdiction conferred upon it. According to this Court:

> We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution.

Cohens v. Virginia, 6 Wheat (19 U.S.) 264 (1821), *quoted in New Orleans Public Services, Inc. v. City of New Orleans,* 491 U.S. 350, 358-59 (1989).

The case for mandamus relief is even clearer in this case because: (1) the state court previously entered an Order deferring the lien validity and priority claims to the Bankruptcy Court, and (2) Plaintiffs are not parties to any state court proceeding and the Bankruptcy Court itself acknowledged that any motion to intervene which they might file in the state court could be denied.

Respectfully submitted,

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Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10536

In the Matter Of: EAST TEXAS HEALTHCARE INC; CHARTWELL HEALTHCARE SERVICES OF MISSOURI INC

Debtors

BILL H BARBEE; HELEN C BARBEE; B HULL BARBEE; F E BROWN, JR; CLARK COLLIER ORREN 1993 TRUST; ET AL

Appellants

v.

MORRIS ESFORMES; COLONIAL HEALTHCARE CENTER INC

Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Aug. 3, 2004)

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellees' motion to dismiss appellants' appeal for lack of jurisdiction is GRANTED.

IT IS FURTHER ORDERED that, construing appellants' notice of appeal as an application for writ of mandamus, it is DENIED.

IT IS FURTHER ORDERED that appellees' motion for an award of attorneys fees and costs is denied.

/s/ Wiener	/s/ Benavides	/s/ Stewart
7/26/2004	7/28/2004	7/28/2004

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILL H. BARBEE, *et al.*, Appellants, v. COLONIAL HEALTHCARE CENTER, INC., and MORRIS ESFORMES, Appellees.	§ § § § § § § § §	Civil Action No. 3:03-CV-1658-N

MEMORANDUM OPINION AND ORDER

(Filed Mar. 22, 2004)

Before the Court is Appellants' appeal from two orders of the Bankruptcy Court of the Northern District of Texas, by which the Bankruptcy Court permissively abstained from Appellants' claims against Appellees and refused to allow Appellants to amend their pleadings to assert jurisdiction based on diversity. Because the Court believes that both orders of the Bankruptcy Court are well-supported by Fifth Circuit law and are not abuses of discretion, the Bankruptcy Court's orders are affirmed.

I. BACKGROUND

On October 5, 1998, an involuntary bankruptcy petition was filed against East Texas Healthcare, Inc. ("East Texas") in the United States Bankruptcy Court for the Northern District of Texas. On June 24, 2002, the Chapter 7 Trustee, Diane Reed, filed a First Amended Complaint in Interpleader against State Bank and Trust

and Appellants, invoking the Bankruptcy Court's jurisdiction to determine the validity of competing claims to certain funds interpleaded into the registry of the Bankruptcy Court. On November 25, 2002, an Agreed Judgment was entered by the Bankruptcy Court, whereby Appellants were declared to have "first, valid, prior and perfected security interests in and liens on the accounts receivable of . . . Colonial Nursing Center, Inc., including all proceeds and cash collateral derived therefrom." On November 27, 2002, Appellants amended their answer and cross-claim to include claims for turnover against Appellees, who had not previously been parties to any proceeding in the East Texas bankruptcy. The Bankruptcy Court granted Appellees' Motion to Dismiss on March 10, 2003, applying permissive abstention under 28 U.S.C. § 1334(c)(1) because: (1) absent the East Texas bankruptcy case, there would be no federal jurisdiction; (2) the matters raised were wholly dependent on state law; (3) litigation concerning the accounts receivable of Colonial Nursing Center, Inc. had been pending in state court; and (4) comity and respect for state law weighed in favor of abstention. The Bankruptcy Court subsequently denied Appellants' motion to amend, holding that the motion was not timely made and would not have provided a basis to determine that permissive abstention was inappropriate.

II. ANALYSIS

A. Permissive Abstention

Appellants claim that the Bankruptcy Court's March 10, 2003 Order must be reversed, because permissive abstention is a narrow doctrine and there are insufficient reasons to decline jurisdiction. The Court disagrees. Permissive abstention is reviewed under an abuse of

discretion standard. *Clark v. Fitzgibbons,* 105 F.3d 1049, 1051 (5th Cir. 1997). On appeal, reversal is not justified if the ruling of the court can be supported on any ground. *Bickford v. Int'l Speedway Corp.,* 654 F.2d 1028, 1031 (5th Cir. 1981). Contrary to Appellants' contention, "[u]nder the 'permissive absention' doctrine, 28 U.S.C. § 1334(c)(1), courts have broad discretion to abstain from hearing state law claims whenever appropriate 'in the interest of justice, or in the interest of comity with State courts or respect for State law.'" *Gober v. Terra + Corp.* (*In re Gober*), 100 F.3d 1195, 1206 (5th Cir. 1996) (citations omitted); *see also Wood v. Wood* (*In re Wood*), 825 F.2d 90, 93 (5th Cir. 1987) (interpreting Bankruptcy Act to provide district courts "broad power to abstain whenever appropriate 'in the interest of justice, or in the interest of comity with State courts or respect for State law.'").[1]

Bankruptcy and district courts are free to consider a number of factors when determining whether permissive abstention is appropriate under Section 1334; for example, the much-cited case of *In re Republic Reader's Service* discusses five factors relevant to discretionary abstention: "(1) the existence of two closely related proceedings based upon state law or a state law cause of action, (2) the absence of any basis for jurisdiction other than section 1334, (3) the likelihood that the proceeding can be timely adjudicated in a state forum[,] (4) the extent to which state law issues predominate, and (5) the degree of relatedness

[1] Appellants cite no authority for their argument that a bankruptcy court is without power to exercise permissive abstention, and such contention is not supported by Fifth Circuit law. *See In Re Gober,* 100 F.3d at 1207 (affirming bankruptcy court's use of permissive abstention and district court's subsequent affirmation).

the proceeding has to the bankruptcy case." *Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc.* (*In re Republic Reader's Serv., Inc.*), 81 B.R. 422, 428 (Bankr. S.D. Tex. 1987). Twelve considerations are considered by the district court in *In re Richmond Tank Car.*[2] *Richmond Tank Car Co. v. CTC Investments* (*In re Richmond Tank Car Co.*), 119 B.R. 124, 126 (S.D. Tex. 1989). The bankruptcy court is not required to address each factor discussed in *Richmond Tank Car;* indeed, in *Gober,* the bankruptcy court's grant of permissive abstention and the district court's order affirming such grant were affirmed by the Fifth Circuit despite the fact that "neither the bankruptcy court nor the district court offered any rationale for abstention in its [written] judgment." *In re Gober,* 100 F.3d at 1207. Furthermore, permissive abstention may be warranted even though some of the *Richmond Tank Car* and *Republic Reader's Service* factors are absent. *See Flores v. Baldwin,* No. 3:01-CV-2873-P, 2002 WL 1118504, at *6-7 (N.D. Tex. May 28, 2002) (applying permissive abstention despite fact that not all *Republic Reader's Service* factors were present).

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[2] Those considerations are: (1) the administrative effect on the estate in the event of a bankruptcy court recommendation of abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of applicable state law; (4) the existence of any related proceedings; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of state claim severance from core bankruptcy matters; (9) the present docket burden in the Bankruptcy Court; (10) the likelihood of forum shopping by one party; (11) the existence of the right to a jury trial by either party; and (12) the presence of nondebtor parties in the proceeding. *In re Richmond Tank Car Co.,* 119 B.R. at 126.

In the instant matter, the Bankruptcy Court clearly considered a number of factors when applying discretionary abstention, and set forth a well-reasoned order which granted Appellees' motion to abstain. The Bankruptcy Court held, in part, that:

> Absent a bankruptcy case, there would be no federal jurisdiction over the Noteholders' actions to pursue their alleged collateral from the defendants. Without the trustee asserting an action under § 542(a), there is no remedy established by the Bankruptcy Code. The amended cross-complaint raises matters determined by state law. The amended cross-complaint does not invoke a substantive right created by federal bankruptcy law. Litigation had been pending in state court, in which the Noteholders had sought to intervene. Presumably, with the resolution of the bankruptcy issues by settlement and the agreed judgment with State Bank, the Noteholders could renew their intervention efforts. The settlement agreement itself recognizes that the Noteholders may pursue their claims regarding the Missouri nursing homes in state court in Missouri.

Reed v. State Bank & Trust (In re East Texas Healthcare, Inc.), Adversary No. 02-3218, slip op. at 8 (Bankr. N.D. Tex. Mar. 10, 2003). In short, the Bankruptcy Court held that Appellants' cross-claim was a state law matter between two non-debtors, the resolution of which would not impact the bankruptcy estate and would be better accomplished in a Missouri proceeding. Although the Bankruptcy Court did not address each of the twelve *Richmond Tank Car* factors briefed and argued by the parties, the court was well within its discretion to grant permissive

abstention. Accordingly, the March 10, 2003 Order is affirmed.

B. Motion to Amend

Appellants further allege that the Bankruptcy Court's May 6, 2003 Order Denying Motions to Reconsider and For Leave to Amend must be overruled as an abuse of discretion. The Court disagrees. It is well-settled that a decision to grant leave to amend is within the discretion of the trial court, and the court's denial of such motion is reviewed under an abuse of discretion standard. *Southmark v. Schulte Roth & Zabel (In re Southmark)*, 88 F.3d 311, 314 (5th Cir. 1996). In deciding whether to grant such leave, "the court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Id.* at 314-15 (citing *Foman v. Davis,* 371 U.S. 178, 182 (1962)).

In the instant matter, the Bankruptcy Court held that Appellants' "effort [] to amend their pleadings to bolster their bankruptcy jurisdiction claims comes too late and is of no avail." *Reed v. State Bank & Trust (In re East Texas Healthcare, Inc.)*, Adversary No. 02-3218, slip. op. at 3 (Bankr. N.D. Tex. May 6, 2003). The Bankruptcy Court explained that the motion to amend, interposed after entry of the March 10, 2003 Order, was untimely, stating the "motion to amend the pleadings after the entry of an order adjudicating a motion to dismiss with an alternative request to abstain is untimely and need not be considered by the court." *Id.* (citing *In re Southmark,* 88 F.3d at 314-15). At a bankruptcy court hearing on January 29, 2002,

Appellants argued that diversity jurisdiction was a factor for the Bankruptcy Court to consider when determining abstention; however, Appellants' motion to amend was delayed until April 21, 2003 – twelve weeks after the hearing and six weeks after the Bankruptcy Court rejected their argument.

In addition, the Bankruptcy Court noted that diversity jurisdiction would not have affected its determination that permissive abstention was warranted. Unlike *Whitmire v. Victus Ltd. T/A Master Design Furniture,* 212 F.3d 885, 887 (5th Cir. 2000), the instant matter was not dismissed for lack of jurisdiction; instead, the Bankruptcy Court held that it had jurisdiction over the adversary proceeding but declined to hear the case out of comity and respect for state law. The Bankruptcy Court explained, "Congress has not chartered this court and the presiding judge of this court has not been vested with the constitutional authority to entertain litigation premised on diversity jurisdiction." *In re East Texas Healthcare, Inc.,* Adversary No. 02-3218, slip. op. at 3. In short, an allegation of diversity jurisdiction would not have affected the Bankruptcy Court's determination on permissive abstention, nor required the Bankruptcy Court to exercise jurisdiction over the matter. Accordingly, the Bankruptcy Court's determination was not an abuse of discretion and is therefore affirmed.

CONCLUSION

Because the Bankruptcy Court's application of permissive abstention under 28 U.S.C. § 1334(c)(1) and denial of Appellant's Motion to Amend are well-supported by Fifth Circuit law, and because the March 10, 2003 and

May 6, 2003 Orders did not constitute abuses of discretion, the Bankruptcy Court's orders are affirmed.

SIGNED this 22 day of March, 2004.

/s/ David C. Godbey
David C. Godbey
United States District
Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
EAST TEXAS HEALTH-CARE, INC., et al.,	§	CASE NO. 98-38547-SAF-7 (Jointly Administered)
DEBTORS.	§	
DIANE G. REED, CHAPTER 7 TRUSTEE, PLAINTIFF,	§	
VS.	§	ADVERSARY NO. 02-3218
STATE BANK & TRUST, et al., DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Colonial Healthcare Center, Inc., and Morris Esformes move to dismiss the amended cross-complaint filed by a group of persons referred to as the East Texas Noteholders. In the alternative, Colonial and Esformes move the court to abstain. In a separate motion, Health Systems, Inc., and James Lincoln move to dismiss the amended cross-complaint. The East Texas Noteholders oppose both motions. The court conducted a hearing on the motions on January 29, 2003.

Diane G. Reed is the Chapter 7 trustee of the bankruptcy estates of several subsidiaries of Chartwell Healthcare, Inc., including three Chartwell debtors who operated nursing homes in Missouri. Those nursing homes generated account receivables pre-bankruptcy order for relief

that arguably became property of the Chartwell subsidiaries' bankruptcy estates. 11 U.S.C. § 541. Receiverships for the Missouri nursing homes had been instituted by the State of Missouri. The receivers collected the accounts receivable. One of the receivers transferred collected funds to the trustee.

On June 28, 2002, Reed filed her first amended complaint, interpleading funds the trustee received from the Missouri receiver. The trustee alleged that State Bank and Trust Company of Dallas, Texas, and the East Texas Noteholders each claimed a first priority, secured claim in the funds. The extent of their liens would exhaust the funds, leaving the trustee with no remaining interest to distribute to unsecured creditors. The trustee commenced the interpleader action for the court to determine the priority of the lien positions of State Bank and the East Texas Noteholders.

On August 13, 2002, the Noteholders filed a third party complaint against Health Systems and Lincoln. On November 27, 2002, the Noteholders filed an amended cross-complaint against Colonial, Esformes, Health Systems and Lincoln. In the amended cross-complaint, the Noteholders allege that the defendants collected receivables belonging to the Chartwell debtors in Missouri, but did not turnover the funds to the trustee. The Noteholders claim a first priority, perfected security interest in those receivables. The Noteholders request the entry of a declaratory judgment establishing their position and the entry of a turnover judgment for the funds.

Meanwhile, on November 27, 2002, the court entered an agreed judgment resolving the competing claims of State Bank and the Noteholders to the funds interplead by

the trustee. In her first amended complaint for interpleader, the trustee reserved a claim to the interplead funds "in the unlikely event" the court determined that neither State Bank nor the Noteholders had an enforceable security interest in the funds. As a result of the judgment entered November 27, 2002, the trustee's reservation of a claim is moot.

Colonial, Esformes, Health Systems and Lincoln move to dismiss the amended cross-complaint for lack of subject matter and personal jurisdiction. The court had subject matter jurisdiction over the trustee's first amended complaint for interpleader. Reed held funds that were property of the bankruptcy estates but subject to competing liens. Reed concluded that the secured creditors' competing lien priorities would exhaust the funds, so she interplead the funds for the court to determine the extent and priority of the liens. 28 U.S.C. §5 157(b)(2)(If) and 1334(b) and (e).

In the amended cross-complaint, the Noteholders allege in effect that the defendants hold additional funds from accounts that are likewise property of the bankruptcy estates, albeit subject to their lien claims. The court has jurisdiction over property of the debtor as of the commencement of a case and of property of the estate. 28 U.S.C. § 1334(e). The court has jurisdiction to determine if property constitutes property of the estate and, if so, to require that the property be turned over to the bankruptcy estate. 28 U.S.C. §§ 157 (b)(2)(E) and 1334(b). Furthermore, the court would have jurisdiction to determine a claim of a security interest by a creditor in the property of the estate. 28 U.S.C. §§ 157(b)(2)(B) and (K) and 1334(b); 11 U.S.C. §§ 502 and 506.

Since the trustee named the Noteholders in an adversary proceeding to determine the extent and priority of their liens in funds from the Missouri nursing homes held by the trustee, the Noteholders could commence third party litigation against other persons who allegedly held property of the estate subject to their lien claims. Recovery of that property, if successful, would be applied to the secured claims of the Noteholders, thereby affecting the distributions to the creditor body of the bankruptcy estates. 28 U.S.C. § 1334(b); *Wood v. Wood (In re Wood),* 825 F.2d 90, 93-94 (5th Cir. 1987). With subject matter jurisdiction, the court obtains personal jurisdiction over the defendants by service pursuant to Bankruptcy Rule 7004(d).

However, the amended cross-complaint cannot be reviewed in a vacuum from events in both this adversary proceeding and the underlying bankruptcy cases. The Noteholders have settled their claims against the bankruptcy estates. In their settlement with the trustee, the Noteholders dismiss with prejudice claims they assert against the bankruptcy estates except for certain reserved claims. For the reserved claims, the Noteholders and the trustee agreed that the claims would not be dismissed if necessary to preserve the Noteholders' causes of action against third persons, but, in that event, the Noteholders entered a covenant not to sue the estates. Consequently, as a result of the settlement, the Noteholders will obtain no further recovery from the bankruptcy estates on account of their claims. The trustee agreed that the Noteholders could prosecute certain defined reserved claims without interference by the bankruptcy estates and that the Noteholders would own those claims free and clear of any liens, contribution rights, or competing claims by other

parties to the settlement, including the trustee. The reserved claims include the claims of a security interest in the subject funds held by the defendants. By order entered May 6, 2002, in *Reed v. Heller Healthcare Finance, Inc., et al.,* adversary proceeding no. 99-3273, the court approved the settlement.

The defendants contend that the trustee has thereby abandoned the estates' interest in the funds. If property has been abandoned by the trustee, it would no longer be property of the estate. The Noteholders respond that the trustee has not abandoned the estates' interest in the property. Indeed, the trustee has not filed a motion to abandon the property pursuant to 11 U.S.C. § 554(a). The court has not ordered the trustee to abandon the property on request of a party in interest and after notice and a hearing. 11 U.S.C. § 554(b). The bankruptcy estates have not been closed. 11 U.S.C. § 554(c). The trustee may only abandon property of the estate pursuant to this statutory authority. *In re Heil,* 141 B.R. 112, 115 (Bankr. N.D. Tex. 1992). The property has therefore not been abandoned. Nevertheless, by virtue of the settlement and the interpleader, the trustee no longer claims an interest in the funds. Pursuant to the settlement, the trustee may not assert any competing claim to the funds from the Missouri nursing homes. Having been approved by the court, the settlement is binding on the trustee. Thus, even though not technically abandoned at this time, the trustee is precluded from asserting a claim to the funds. The settlement deems the claim to the funds to be owned by the Noteholders.

Notwithstanding the settlement, the Noteholders argue that this court may nevertheless direct the turn over of funds from the defendants. As discussed above, this

court does have jurisdiction to order the turn over of property of the estate. 28 U.S.C. § 157(b)(2)(E). The Bankruptcy Code provides for the turn over of property of the estate "to the trustee." 11 U.S.C. § 542(a). But the trustee is not seeking that relief. Under the settlement, the trustee may not seek that relief. The court may not use the Code's "turn over" provision to order the defendants to pay the funds to the Noteholders, even if the Noteholders establish that they have a security interest in the subject funds.

Consequently, the court had jurisdiction at the commencement of the litigation. Once acquired, jurisdiction is not lost by developments concerning the litigation. But the bankruptcy estates no longer claim an interest in the subject funds. The Noteholders have either dismissed their claims against the bankruptcy estates with prejudice or entered a covenant not to sue the estates regarding the claims. Consequently, any collection by the Noteholders from the defendants based on their alleged security interest will no longer have an effect on the distributions to creditors of the bankruptcy estates.

Colonial and Esformes alternatively request that the court abstain from adjudicating this dispute. At the hearing, Health Systems and Lincoln did not oppose that alternative request for relief. Colonial and Esformes argue that abstention is either mandatory or should be granted in the exercise of the court's discretion. 28 U.S.C. § 1334(c)(1) and (2).

Discretionary abstention is appropriate. The court may abstain from hearing a particular proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1);

In re Gober, 100 F.3d 1195, 1206 (5th Cir. 1996). Absent a bankruptcy case, there would be no federal jurisdiction over the Noteholders' actions to pursue their alleged collateral from the defendants, Without the trustee asserting an action under § 542(a), there is no remedy established by the Bankruptcy Code. The amended cross-complaint raises matters determined by state law. The amended cross-complaint does not invoke a substantive right created by federal bankruptcy law. Litigation had been pending in state court, in which the Noteholders had sought to intervene. Presumably, with the resolution of the bankruptcy issues by settlement and the agreed judgment with State Bank, the Noteholders could renew their intervention efforts. The settlement agreement itself recognizes that the Noteholders may pursue their claims regarding the Missouri nursing homes in state court in Missouri.

Counsel for the Noteholders asserts that her law firm owns part of the Noteholders' claims and that the firm has taken an assignment of their claims. She argues that the law firm can assert the claims against the bankruptcy estate. Counsel argues, therefore, that collection by the Noteholders from the defendants could have a conceivable effect on the handling of the law firm's claims in the bankruptcy cases. Presumably If the Noteholders recover from these defendants, part of their recovery will go to their counsel, thereby reducing counsel's claims against this estate. By attempting to assert a claim against the estate when the Noteholders have settled their claims, counsel appears to be attempting to circumvent an order of this court approving the settlement. Counsel also appears to be attempting to undermine a portion of the settlement. This court does not anticipate allowing a distribution to

counsel on account of the law firm's alleged ownership of part of the Noteholders' claims or from an assignment of part of the claims. And, certainly, counsel will not expect the trustee to seek to recover from the defendants in order to increase funds for distribution to creditors of the estates, including counsel, when her clients are attempting to collect directly from the defendants. Counsel's assignment and ownership claim appears to conflict with the interests of her client. Counsel's asserted claim does not weigh against abstaining.

Counsel for the Noteholders also asserts that the trustee is going to bring an action to collect the funds. The settlement agreement precludes an action since that would be a claim against matters reserved for the Noteholders. Furthermore, the court does not base its decision on speculation about what litigation may be commenced in the future by the trustee.

Therefore, the court determines that while it had subject matter jurisdiction as the litigation had been initially commenced, subsequent events lead the court to abstain from adjudicating the amended. cross-complaint. The Noteholders may not invoke the turnover power of the trustee to collect on their alleged collateral. The state law claims for declaratory relief brought in that complaint should be pursued in state court. As a result of the settlement and. the agreed judgment in the inter-pleader action, the trustee claims no interest in the subject funds and the Noteholders will not pursue any claims against the estate, regardless of the success of their collection efforts from the defendants. As state law claims remain disputed among non-debtors, comity and respect for state law weigh in favor of abstention.

As the remaining matters in the adversary proceeding have been finally resolved, with the abstention on the amended cross-complaint, the adversary proceeding shall be closed. As, a result, the court need not address the motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) or the motion for mandatory abstention.

Based on the foregoing,

IT IS ORDERED that the alternative motion of Colonial Healthcare Center, Inc., and Morris Esformes to abstain is GRANTED. The court shall abstain from adjudicating the amended cross-complaint against Colonial Healthcare Center, Inc., Morris Esformes, Health Systems, Inc., and James Lincoln.

IT IS FURTHER ORDERED that, as a result, the remaining issues raised by the pending motions need not be decided.

IT IS FURTHER ORDERED that this adversary proceeding is **CLOSED.**

Dated this 10th day of March, 2003.

/s/ Steven A. Felsenthal
Steven A. Felsenthal
United States Bankruptcy
Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
EAST TEXAS HEALTH-CARE, INC., et al.,	§	CASE NO. 98-38547-SAF-7 (Jointly Administered)
DEBTORS.	§	
DIANE G. REED, CHAPTER 7 TRUSTEE,	§	
PLAINTIFF,	§	
VS.	§	ADVERSARY NO. 02-3218
STATE BANK & TRUST,	§	
DEFENDANT.	§	

ORDER DENYING MOTIONS TO RECONSIDER AND FOR LEAVE TO AMEND

On March 19, 2003, the East Texas Noteholders filed a motion for reconsideration and modification of this court's order of abstention entered March 11, 2003. By order entered April 1, 2003, the court directed that the third party defendants file responses to the motion. The court held that it would decide the motion on the written pleadings. The third party defendants filed their responses on April 14 and April 15, 2003. The Noteholders filed a reply on April 21, 2003, together with a motion for leave to amend the third party complaint. The parties then submitted letters to the court on April 22, 2003, and April 28, 2003.

The court considers the Noteholders' motion for reconsideration as a motion under Bankruptcy Rule

9023. The purpose of a Fed. R. Civ. P. 59 motion, made applicable by Bankruptcy Rule 9023, is to correct manifest errors of law or fact or to present newly discovered evidence. The motion may not be used to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits. *See Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990); *In the In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 393 (5th Cir. 1989); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207 (5th Cir. 1986).

In its order entered March 11, 2003, the court, in the exercise of discretion, abstained from hearing the third party complaint and thereupon administratively closed the adversary proceeding. Contrary to the Noteholders' argument, the order does not dismiss the adversary proceeding. To support its exercise of discretion, the court articulated its reasons for abstaining. The Noteholders have not established that the court made an manifest error of fact or law in its reasoning. The exercise of discretion is vested in this court, to be set aside only for an abuse of discretion. While the Noteholders would have preferred a different result, the motion does not establish any illogic in the court's reasoning that would support a finding of an abuse of discretion. In essence, the Noteholders attempt to reargue their case in the motion for reconsideration. That is not the function of a motion under Rule 9023.

This court does not sit as a forum for the collection of collateral of entities that will have no effect on the administration of a bankruptcy case. Other courts of competent jurisdiction may perform that function. The Noteholders now contend that this court should allow them

the opportunity to amend their third party complaint to assert diversity jurisdiction. A motion to amend the pleadings after the entry of an order adjudicating a motion to dismiss with an alternative request to abstain is untimely and need not be considered by the court. *See In re Southmark Corp.*, 88 F.3d 311, 314-15 (5th Cir. 1996). Nevertheless, the court notes that Congress has not chartered this court and the presiding judge of this court has not been vested with the constitutional authority to entertain litigation premised on diversity jurisdiction. The Noteholders' efforts to amend their pleadings to bolster their bankruptcy jurisdiction claims comes too late and is of no avail. In its memorandum opinion and order entered March 11, 2003, the court found that it had jurisdiction over the adversary proceeding as originally filed by Diane Reed, the Chapter 7 trustee of the bankruptcy estates off East Texas Healthcare, Inc., et al. The court further found that developments in the adversary proceeding and the underlying bankruptcy case supported the discretionary decision to abstain.

Based on the foregoing,

IT IS ORDERED that the East Texas Noteholders' motion for reconsideration and modification of order of abstention entered March 11, 2003, and the East Texas Noteholders' motion for leave to amend third party complaint are **DENIED**.

Signed this 6th day of May, 2003.

/s/ Steven A. Felsenthal
Steven A. Felsenthal
United States Bankruptcy
Judge